

COPY

Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C

In the Matter of )  
 )  
Distribution of DART Sound Recordings )  
Fund/ Copyright Owners Subfund Royalties )  
For 2011 )

Received  
APR 27 2012  
Copyright Royalty Board

Docket No.

2012-3 CRBDD  
2011(SRF)

**MOTION OF THE ALLIANCE OF ARTISTS AND RECORDING COMPANIES  
TO DISMISS THE PILLAI 2011 DART SOUND RECORDINGS FUND/COPYRIGHT  
OWNERS SUBFUND CLAIM**

The Alliance of Artists and Recording Companies ("AARC") is a not-for-profit organization established to administer private copying royalties ("DART") pursuant to the Audio Home Recording Act of 1992 ("AHRA"). AARC is the leading common agent representing featured recording artists and sound recording copyright owners in DART proceedings.

AARC currently represents approximately 150,000 featured recording artists and sound recording copyright owners. AARC is an Interested Copyright Party ("ICP") in DART distribution proceedings pursuant to Section 1001(7)(D) of AHRA, which defines an ICP as "any association or other organization that represents featured recording artists or sound recording copyright owners." 17 U.S.C. § 1001(7)(D) (2006). Pursuant to AHRA, AARC files two joint claims annually for DART Sound Recordings Fund royalties, one for the organization's featured recording artist membership and one for the sound recording copyright owner membership.

## **BRIEF ARGUMENT**

Pursuant to AHRA and the Copyright Royalty Board (“CRB”) regulations, in order to substantiate a claim for DART a claimant must identify a basis for the claim. 17 U.S.C. § 801(b)(4) (2006); 37 C.F.R. § 360.22(b)(6). Unless a claimant can demonstrate that he or she has a legitimate basis for asserting a claim, the claim is patently deficient and warrants dismissal. We will show that the claimant in question failed to identify at least one sound recording that establishes a basis for his 2011 DART Sound Recordings Fund/Copyright Owners Subfund claim, and that the claim, therefore, is patently deficient. Further, we will show that the issue at hand is not a novel one. Decision makers in prior proceedings have established the requirement that claimants must file a prima facie claim. AARC respectfully submits this motion to dismiss the claim at issue here as baseless and, thus, invalid.

## **BACKGROUND**

On February 29, 2012, AARC filed its two claims for the 2011 DART Sound Recordings Fund royalties. Eight other claimants, including Pramod Kesav Narayana Pillai (“Pillai”), filed claims for the 2011 DART Sound Recordings Fund/Copyright Owners Subfund royalties. In Pillai’s filing with the CRB, dated February 02, 2012, he failed to list a title of a sound recording embodied in a digital or analog musical recording, lawfully made under the Copyright Act, that had been distributed between January 1 and December 31, 2011, which is required for all DART Sound Recordings Fund/Copyright Owners Subfund claims. 37 C.F.R. § 360.22(b)(6).

Under the “Claim Identification” section of his claim, Pillai entered: “Quality Engineering In Setting Content Bench Mark and Tools” followed by “Development of a sample benchmark.” Pramod Kesav Narayana Pillai, Single Claim for DART Royalty Fees Collected

During 2011 (Feb. 02, 2012). Based upon thorough research of music industry resources and of the United States Copyright Office (“Copyright Office”) online public catalog database, we submit that no such sound recording titles exist, and that the titles at issue here are, as stated in the Copyright Office records, the title and description of “Print material.” Seltzer Aff. Ex. A (2012); Koons Aff. Ex. B (2012); United States Copyright Office, Public Catalog (2012), *see* Ex. C.<sup>1</sup>

## ARGUMENT

### **I. The Copyright Royalty Judges Have the Authority to Review and Reject Claims that are Without Basis.**

The Copyright Royalty Judges (“the Judges”), pursuant to the Copyright Act, have the authority to review and reject claims, foregoing any formal hearing on the matter, when such claims are deemed without basis. AARC respectfully requests that the Judges exercise this authority and grant AARC’s motion to dismiss the Pillai claim as without basis and, therefore, patently deficient.

Under the Copyright Royalty and Distribution Reform Act of 2004 (“CRDRA”), Chapter 8 of the Copyright Act, the Judges have the authority to accept or reject royalty claims on the basis of timeliness or the failure to establish the basis for a claim. 17 U.S.C. § 801(b)(4) (2006). Moreover, the Judges are authorized to exercise broad discretion when a claim is deemed baseless, and forego a formal hearing in favor of a review process by the CRB. *Id.*

To qualify for royalties, an ICP must file a claim with the CRB during the first two

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<sup>1</sup> Upon notice of Pillai’s filing, AARC counsel contacted Pillai in an attempt to discuss his claim. AARC’s representative inquired about the title listed in Pillai’s claim. Pillai, however, refused to discuss anything regarding his claim.

months of each calendar year. *Id.* at 1007(a)(1). When submitting the claim, ICPs must list certain information in order to substantiate a claim. 37 C.F.R. § 360.22 (2011). Allocation of royalties to claimants may occur via universal agreement among the parties, or by administrative litigation before the Judges, who comprise the CRB. 17 U.S.C. § 1007(b), (c). The CRB was established pursuant to the CRDRA, which phased out the bifurcated Copyright Office/Copyright Arbitration Royalty Panel ("CARP") decision-making model and replaced it with three full-time Judges. *Id.* at 801-805. The authority to make determinations previously held by the Copyright Office and CARP was transferred to the Judges, and all prior decisions made by the Copyright Office and CARP or their predecessor, the Copyright Royalty Tribunal, were made binding. *Id.* at 803.

Such authority to review and reject claims without a formal hearing is the codification of a longstanding policy of working towards administrative efficiency. *See* 37 C.F.R. § 350.6 (2011) (construing the regulations of the Copyright Royalty Judges to advance the stated goal of just and efficient procedures, which was the intention of the drafters). Therefore, it is within the discretion of the Judges to review the claim at issue here, and determine whether grounds for dismissal exist.

**II. The Judges Should Grant AARC's Motion to Dismiss the Pillai Claim for 2011 DART Sound Recordings Fund/Copyright Owners Subfund Royalties Because Pillai Failed to Provide a Basis for His Claim.**

In his filing, dated February 02, 2012, Pillai failed to identify at least one sound recording of which he is the copyright owner and which was distributed during the 2011 calendar year, as is required to substantiate a claim against the 2011 DART Sound Recordings Fund/Copyright

Owners Subfund. Because Pillai failed to demonstrate a legitimate basis for asserting his claim by the statutory deadline, Pillai's claim is incurably defective and warrants dismissal.

Section 360.22 of the Copyright Office rules, codified as title 37 of the Code of Federal Regulations, requires a DART Sound Recordings Fund claimant to provide certain information to the Copyright Office. 37 C.F.R. § 360.22 (2011). In addition to the more commonplace elements, like name and address, there are two key elements that must be supplied. *Id.* First, a claimant must show how he or she fits within the definition of an ICP.<sup>2</sup> *Id.* Second, a claimant must identify at least one valid sound recording embodied in a musical recording, which has been distributed during the preceding calendar year. *Id.* This latter requirement is mandatory in order to substantiate a DART Sound Recordings Fund Royalties claim. *Id.*

In a 2003 motion to dismiss, which AARC filed against a claim for 2002 DART Sound Recordings Fund/Featured Recording Artists Subfund royalties ("2002 Claim"), the Copyright Office analyzed the content requirements for DART Sound Recordings Fund Royalties claims, and found that a failure to identify at least one valid sound recording deemed the claim patently deficient. Order, Distribution of DART Sound Recordings Fund/Featured Recording Artists Subfund Royalties for 2002, Docket No. 2003-3 CARP DD 2002, *see* Ex. D.<sup>3</sup> The Copyright Office reasoned that a failure to establish a basis was fatal to the claim. *Id.* In keeping with the regulations' mandatory language – "shall" – the Copyright Office applied strict adherence to the requirement of identifying at least one valid sound recording and, dismissed the 2002 claim for failure to include a basis. Order, Distribution of DART Sound Recordings Fund/Featured

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<sup>2</sup> As defined in AHRA, an ICP for the DART Sound Recordings Fund/Copyright Owners Subfund is a claimant who owns the exclusive right to reproduce a sound recording of a musical work embodied in a digital or analog musical recording lawfully made under the U.S. copyright law that has been distributed during the period to which the royalty payments claimed pertain. 17 U.S.C. § 1001(7)(A) (1992).

<sup>3</sup> In the 2002 Claim decision, the Copyright Office cites to specific sections of the Code of Federal Regulations, which AARC also applies in its argument for dismissal of the Pillai claim. The code sections have since changed; however, the substantive meaning remains the same. Here, we cite to the latest version of the C.F.R.

Recording Artists Subfund Royalties for 2002, Docket No. 2003-3 CARP DD 2002, *see* Ex. D; 37 C.F.R. § 360.22(b)(6).

The facts in the 2002 Claim mirror the facts herein. In the 2002 Claim, the claimant listed in the “Claim Identification” section several sound recordings whose featured artists, according to all available evidence, were performers other than the claimant. Order, Distribution of DART Sound Recordings Fund/Featured Recording Artists Subfund Royalties for 2002, Docket No. 2003-3 CARP DD 2002; *see* Ex. D. In its discussion, the Copyright Office concluded that merely filling in the claim form with “bald assertions” as to a key requirement, such as the basis for the claim, was not “enough to force the matter to . . . hearing when another party raises a legal challenge to the sufficiency of the claim.” *Id.* To dismiss the claim as lacking prima facie validity, the Copyright Office relied on AARC’s contention that the claimant had not provided a basis for her claim because she was not the featured recording artist on the titles she listed. *Id.*

Similarly, Pillai failed to satisfy the AHRA’s and regulations’ requirement that he establish a basis for his claim. In his February 02, 2012 filing, Pillai listed in the “Claim Identification” section of his claim the title, “Quality Engineering In Setting Content Bench Mark and Tools” followed by “Development of a sample benchmark.” Pramod Kesav Narayana Pillai, Single Claim for DART Royalty Fees Collected During 2011 (Feb. 02, 2012). However, in the Copyright Office online public catalog database, we found the title “Quality Engineering In Setting Content Bench Mark and Tools” defined as “Print material” and “technical literature,” which “convey[s] explanations on benchmarking process and procedures,” with “Development of a sample benchmark” as the “Basis of Claim” for the copyright registration. United States Copyright Office, Public Catalog (2012), *see* Ex. C. Print material does not fall within the

category of a sound recording, as defined in AHRA. 17 U.S.C. § 1001(5)(A) (2006). It is also worth noting that even if Pillai's textbook were found to be a book on tape, which does not appear to be the case, AHRA explicitly exempts from entitlement to royalties "a material object in which the fixed sounds consist entirely of spoken word recordings." *Id.* at 1001(5)(B).

Additionally, in the interest of the Copyright Office's explicit goal of administrative efficiency, Pillai should not be permitted, now that the statutory deadline has passed, to amend his claim and replace the title of the textbook with that of a valid sound recording to which he owns the copyright. *See* 37 C.F.R. §§ 350.6, 360.21; *see also* 17 U.S.C. § 1007(a)(1). AHRA mandates that a claim for royalties collected during the preceding year must be filed during January and February. 17 U.S.C. § 1007(a)(1). The importance of the timely filing of valid claims is also well established in royalty distribution proceedings. The CRB has recognized that permitting claimants to file baseless claims would seriously clog up the process. In cable proceedings, where there is an identical requirement that a claimant list an example of a basis for the claim, the Copyright Office has noted:

To support such a claim, each claimant may reasonably be asked to identify at least one secondary transmission of his or her work (basis for a cable claim), thus permitting the Copyright Office to screen the claims and dismiss any claimants who are clearly not eligible for royalty fees . . . *Eliminating the requirement that the claim identify at least one instance of such qualifying retransmission would effectively eviscerate the claim requirement itself.*

59 Fed. Reg. 2550, 2564 (January 18, 1994) (emphasis added).

Administrative efficiency dictates that claimants file *prima facie* claims. Moreover, permitting baseless claims thwarts administrative efficiency because it decreases claimants' motivation to expend resources negotiating settlement. Uncertainty as to the validity of claims filed and the identity of the other claimants will make claimants more likely to seek formal

hearings. Few, if any, claimants will be motivated to seek settlements when, by doing so, they may be negotiating away a portion of their royalties to a claimant who has no valid claim. A decrease in settlements would drastically increase the workload of the Judges and waste the valuable and limited resources of the CRB.

It follows that Pillai's failure to satisfy the key requirement of identifying at least one sound recording that satisfies the mandates of AHRA and the regulations equates to a failure to establish a *prima facie* claim to 2011 DART Sound Recordings Fund/Copyright Owners Subfund royalties. 37 C.F.R. § 360.22(b)(6). Regulation and precedent support the dismissal of a royalty claim for failure to provide a basis. Further, policy dictates that such a key requirement as establishing a basis shall not be amended past the statutory deadline. Therefore, the Copyright Royalty Judges should dismiss Pillai's claim for 2011 DART Sound Recordings Fund/Copyright Owners Subfund royalties.


### CONCLUSION

As clearly established above, "Quality Engineering In Setting Content Bench Mark and Tools" and/or "Development of a sample benchmark" are not the titles of sound recordings. In the words of Pillai himself, as reported in his copyright registration in the Copyright Office online public catalog database, "Quality Engineering In Setting Content Bench Mark and Tools" is the title of "print material" and "Development of a sample benchmark" is the "Basis of Claim," for Pillai's copyright registration of this printed material. These facts alone invalidate Pillai's claim to *sound recording* royalties.



Accordingly, the Pillai 2011 DART Sound Recordings Fund/Copyright Owners Subfund royalties claim warrants dismissal as patently deficient on grounds that: (1) the claim does not identify at least one sound recording, sold during the calendar year 2011, of which Pillai is the sound recording copyright owner, and (2) such failure to identify at least one sound recording that establishes a basis for the claim is an incurable defect. AARC respectfully requests that the Copyright Royalty Judges exercise their authority and dismiss Pillai's claim for 2011 DART Sound Recordings Fund/Copyright Owners Subfund royalties.

Respectfully submitted,

A handwritten signature in black ink, reading "Linda R. Bocchi". The signature is fluid and cursive, with the first name "Linda" being more prominent and the last name "Bocchi" following in a similar style.

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April 27, 2012

In the Matter of  
Distribution of DART  
Sound Recordings Fund/Copyright Owners Subfund Royalties For 2011

Docket No. \_\_\_\_\_

Motion to Dismiss

**EXHIBIT A**

Richard Seltzer Affidavit, declaring that the title the claimant identified in the "Claim Identification" section of his 2011 DART Sound Recordings Fund/Copyright Owners Subfund claim is not a sound recording, and that no record sales exist for a sound recording copyright owner by the name of Pramod Kesav Narayana Pillai.

## EXHIBIT A

### DECLARATION OF RICHARD SELTZER

I, Richard Seltzer, declare under penalty of perjury as follows:

1. My name is Richard Seltzer, and I am a Political Science professor at Howard University, where I currently teach graduate courses in statistics and research methods. For the past thirty-two years, I have also designed and conducted various surveys. Additionally, I have authored numerous publications, which are listed in the attached curriculum vitae. On account of my experience in the field, I have previously been qualified as an expert in statistics and survey research in several federal and state courts. In addition to my teaching responsibilities, I have acted as a consultant to a variety of organizations in creating and maintaining complex databases. For the last fifteen years, I have worked with the Alliance of Artists and Recording Companies ("AARC") as a royalty distribution system and sales data consultant. It is through this professional relationship that I have become familiar with Nielsen SoundScan's sales data,<sup>1</sup> the data my following testimony is based upon.

2. I confirm that AARC's Royalty Distribution System uses SoundScan data to determine the annual allocation of the DART Sound Recordings Fund royalties among claimants before the Copyright Royalty Board.

3. I have reviewed the 2011 SoundScan record sales data in the AARC Royalty Distribution System and found no evidence of a digital or analog musical sound recording entitled, "Quality Engineering In Setting Content Bench Mark and Tools Development of a sample benchmark," "Quality Engineering In Setting Content Bench Mark and Tools," or "Development of a sample benchmark."

4. I have reviewed the 2011 SoundScan record sales data in the AARC Royalty Distribution System and found zero sales for any digital or analog musical sound recording entitled, "Quality Engineering In Setting Content Bench Mark and Tools Development of a sample benchmark," "Quality Engineering In Setting Content Bench Mark and Tools," or "Development of a sample benchmark," because I found no such entitled work.

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<sup>1</sup> "Nielsen provides charts and insights for both music broadcast and sales. We capture in excess of 100 million song performances on more than 2,000 radio, satellite radio, network radio, and music video channels across Canada, Mexico, Puerto Rico and the United States. Nielsen's tracking of music sales data is used by all major and most independent record companies as well as distribution companies, artist managers, booking agents, concert promoters, performing rights organizations, government agencies, venue owners, traditional retailers, online retailers, and digital delivery companies. Nielsen's data on airplay and sales is featured weekly in *Billboard* magazine and is widely cited by numerous publications and broadcasters as the standard for music industry measurement." See: <http://www.nielsen.com/us/en/industries/media-entertainment/music.html>

5. I have reviewed the 2011 SoundScan record sales data in the AARC Royalty Distribution System and found no sound recording copyright owner by the name Pramod Kesav Narayana Pillai and, thus, no sound recordings for anyone named Pramod Kesav Narayana Pillai.

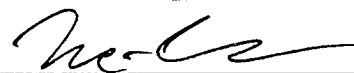
I declare under penalty of perjury that the foregoing is true and correct.

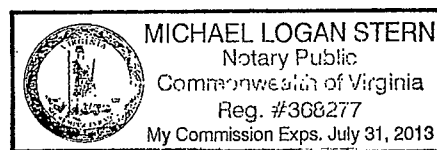
  
Richard Seltzer

4/23/2012  
Date

City of Alexandria  
Commonwealth of Virginia

Certified this 23 day of 4, 2012

  
Notary Public  
My commission expires: 7/31/13



## CURRICULUM VITAE

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- a. Methodology: including public opinion surveys and statistical analysis.
- b. Legal Studies: including juror decision making processes and jury composition.

### IV. BOOKS

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In the Matter of  
Distribution of DART  
Sound Recordings Fund/Copyright Owners Subfund Royalties For 2011

Docket No. \_\_\_\_\_

Motion to Dismiss

**EXHIBIT B**

Sarah Koons Affidavit, declaring that the title the claimant identified in the "Claim Identification" section of his 2011 DART Sound Recordings Fund/Copyright Owners Subfund claim is "print material," that no sound recording was found to exist entitled, "Quality Engineering In Setting Content Bench Mark and Tools Development of a sample benchmark," "Quality Engineering In Setting Content Bench Mark and Tools," or "Development of a sample benchmark," and no sound recording whose copyright owner is one Pramod Kesav Narayana Pillai was found to exist.

## EXHIBIT B

### DECLARATION OF SARAH KOONS

I, Sarah Koons, declare under penalty of perjury as follows:

1. My name is Sarah Koons, and I am a Royalty Administrator at the Alliance of Artists and Recording Companies ("AARC"). It is through this professional capacity that I have become familiar with the United States Copyright Office online public catalog database, Nielson SoundScan data<sup>1</sup>, Discogs, All Music Guide, iTunes and other relevant online resources, upon which the data in my following testimony is based.
2. I have researched the United States Copyright Office online public catalog database and have found that no sound recording exists entitled "Quality Engineering In Setting Content Bench Mark and Tools Development of a sample benchmark," "Quality Engineering In Setting Content Bench Mark and Tools," or "Development of a sample benchmark."
3. I have researched the United States Copyright Office online public catalog database and have found that "print material" exists entitled, "Quality Engineering In Setting Content Bench Mark and Tools," with "Development of a sample benchmark" identified as the "Basis of Claim" for the copyright registration of this printed material, and one Pramod Kesav Narayana Pillai, of India, is listed as the copyright claimant.
4. I have researched SoundScan, Discogs, All Music Guide, iTunes and have found that no sound recording exists entitled, "Quality Engineering In Setting Content Bench Mark and Tools Development of a sample benchmark," "Quality Engineering In Setting Content Bench Mark and Tools," or "Development of a sample benchmark."
5. I have researched SoundScan, Discogs, All Music Guide, iTunes and was unable to find a sound recording whose copyright owner is identified as one Pramod Kesav Narayana Pillai.

I declare under penalty of perjury that the foregoing is true and correct.

---

<sup>1</sup> "Nielsen provides charts and insights for both music broadcast and sales. We capture in excess of 100 million song performances on more than 2,000 radio, satellite radio, network radio, and music video channels across Canada, Mexico, Puerto Rico and the United States. Nielsen's tracking of music sales data is used by all major and most independent record companies as well as distribution companies, artist managers, booking agents, concert promoters, performing rights organizations, government agencies, venue owners, traditional retailers, online retailers, and digital delivery companies. Nielsen's data on airplay and sales is featured weekly in *Billboard* magazine and is widely cited by numerous publications and broadcasters as the standard for music industry measurement." See: <http://www.nielsen.com/us/en/industries/media-entertainment/music.html>

Sarah Koons  
Sarah Koons

4/26/2012  
Date

City of Alexandria

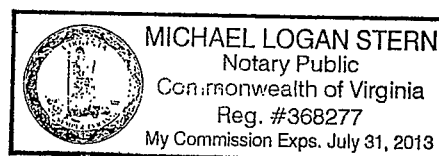
Commonwealth of Virginia

Certified this 26 day of 4, 20 12

M. Stern

Notary Public

My commission expires: 7/31/13



In the Matter of  
Distribution of DART  
Sound Recordings Fund/Copyright Owners Subfund Royalties For 2011

Docket No. \_\_\_\_\_

Motion to Dismiss

**EXHIBIT C**

Print out of the United States Copyright Office online public catalog database, establishing that a work entitled, "Quality Engineering In Setting Content Bench Mark and Tools" is print material.



**Copyright**

United States Copyright Office

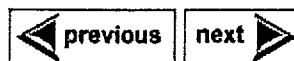
[Help](#)[Search](#)[History](#)[Titles](#)[Start Over](#)

## Public Catalog

Copyright Catalog (1978 to present)

Search Request: Left Anchored Title = quality engineering in setting content

Search Results: Displaying 1 of 1 entries

**Labeled View**

### *Quality Engineering In Setting Content Bench Mark and Tools.*

**Type of Work:** Text**Registration Number / Date:** TXu001772693 / 2011-10-05**Application Title:** Quality Engineering In Setting Content Bench Mark and Tools.**Title:** Quality Engineering In Setting Content Bench Mark and Tools.**Description:** Print material.**Copyright Claimant:** Pramod Kesav Narayana Pillai, 1974- . Address: Payikkattu House, Kalavamkodam P.O., Cherthala, Alleppy, Kerala, 688586, India.**Date of Creation:** 2011**Authorship on Application:** Pramod Kesav Narayana Pillai, 1974- ; Domicile: United States; Citizenship: United States. Authorship: Essays (technical literature) convey explanations on benchmarking process and procedures (new material)**Basis of Claim:** Development of a sample benchmark.**Names:** Pillai, Pramod Kesav Narayana, 1974-**Save, Print and Email ([Help Page](#))**

Select Download Format    Full Record    Format for Print/Save

Enter your email address:

Email

[Help](#) [Search](#) [History](#) [Titles](#) [Start Over](#)[Contact Us](#) | [Request Copies](#) | [Get a Search Estimate](#) | [Frequently Asked Questions \(FAQs\) about Copyright](#) | [Copyright Office Home Page](#) | [Library of Congress Home Page](#)

**Copyright**

United States Copyright Office

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## Public Catalog

Copyright Catalog (1978 to present)

Search Request: Author = Pillai, Pramod Kesav Narayana, 1974-

Search Results: Displaying 1 through 4 of 4 entries.



Resort results by:

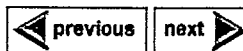
[Set Search Limits](#)

#	Name Heading	Author	Full Title	Date
<a href="#">[1]</a>	Pillai, Pramod Kesav Narayana, 1974-		Importance of Risk Assessment In The Context Of Worker Safety.	2011
<a href="#">[2]</a>	Pillai, Pramod Kesav Narayana, 1974-		Leadership Ladder and the Overlap.	2011
<a href="#">[3]</a>	Pillai, Pramod Kesav Narayana, 1974-		Quality Engineering In Setting Content Bench Mark and Tools.	2011
<a href="#">[4]</a>	Pillai, Pramod Kesav Narayana, 1974-		Risk Assessment for Engineer Who Are In A Risk Prone Area.	2011

Resort results by:

[Set Search Limits](#)

Clear Selected   Retain Selected



Save, Print and Email ( <a href="#">Help Page</a> )	
<b>Records</b>	Select Format:   Full Record   Format for Print/Save
All on Page Selected On Page Selected all Pages	Enter your email address: <input type="text"/> Email

Search for: Pillai, Pramod Kesav N   Search by: Title (omit initial article A, An, The, El, La, Das etc.)

Item type: None

25 records per page

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In the Matter of  
Distribution of DART  
Sound Recordings Fund/Copyright Owners Subfund Royalties For 2011

Docket No. \_\_\_\_\_

Motion to Dismiss

**EXHIBIT D**

Order, Distribution of DART Sound Recordings Fund/Featured Recording Artists Subfund  
Royalties for 2002, Docket No. 2003-3 CARP DD 2002.



In the Matter of

Distribution of DART Sound Recordings  
Fund/Featured Recording Artists Subfund  
Royalties for 2002

Docket No. 2003-3 CARP DD 2002

LIBRARY  
OF  
CONGRESS

## ORDER

COPYRIGHT  
OFFICE

On June 17, 2003, the Alliance of Artists and Recording Companies ("AARC") filed a motion seeking dismissal of Trudy Borset's 2002 claim ("Borset claim") to the Featured Recording Artists Subfund of the Sound Recording Fund for the statutory license contained in chapter 10 of the Copyright Act. AARC also filed a reply on June 30, 2003, in support of its initial motion to dismiss. Borset did not respond to the motion.

Copyright  
Arbitration  
Royalty  
Panels

AARC is a non-profit organization that collects and distributes copyright royalty fees collected pursuant to the Audio Home Recording Act of 1992 ("AHRA"). Each year since the passage of the AHRA, AARC has filed a claim on behalf of the featured recording artists and record companies that it represents for their share of the royalty fees in the Featured Recording Artists Subfund.<sup>1</sup> For calendar year 2002, the Copyright Office received sixteen claims to the royalty fees in the Featured Recording Artists Subfund. Fourteen of the sixteen claimants have already resolved their claims, leaving only two claims to the 2002 Featured Recording Artists Subfund—the Borset claim and the AARC claim.

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In its motion to dismiss, AARC makes two arguments. First, it argues that the Borset claim is patently deficient because it fails to identify at least one sound recording that establishes a basis for the claim. Second, AARC maintains that unless a claimant can demonstrate that it has a legitimate basis for asserting the claim, the claim is incurably defective and must be dismissed. In other words, Borset must be a bona fide featured recording artist for a sound recording that was distributed or transmitted to the public in 2002. To satisfy that requirement, Borset must fit the definition of an interested copyright owner pursuant to section 1001(7)(C) and identify at least one sound recording embodied in a digital music recording or an analog music recording lawfully made and distributed or disseminated to the public in a transmission during calendar year 2002 for which she is the featured recording artist. 37 C.F.R. § 259.3(a)(5).

<sup>1</sup> AHRA requires manufacturers and importers of digital audio recording technology and devices to pay a royalty fee for the distribution of these products in the United States. These royalty fees are deposited with the Copyright Office for later distribution to copyright owners of the sound recordings, featured recording artists, music publishers, songwriters, non-featured vocalists and non-featured musicians. By law, the royalty fees are allocated to two funds, the Sound Recordings Fund or the Musical Works Fund, and further allocated within each fund among the different categories of interested copyright parties. See 17 U.S.C. §§ 1001 and 1007. Four percent of the royalty fees in the Sound Recordings Fund are placed in escrow accounts managed by an independent administrator for distribution to the non-featured vocalists and non-featured musicians. The remaining royalty fees in the Sound Recordings Fund are then distributed to either copyright owners of the sound recordings or featured recording artists in accordance with the procedures set forth in 17 U.S.C. § 1007 and the regulations of the Copyright Office. See 37 C.F.R. part 259. To begin the process, the rules require each interested copyright party to file a claim during the months of January and February for fees collected the previous calendar year.

AARC recognizes that Borset claims to be the featured recording artist for the following six identified sound recordings: "Broke Down Palace," "Candy Man," "You Can't Always Get What You Want," "Free as a Bird," "In Spite of All Danger," and "Helpless," which likely were distributed or transmitted to the public in 2002. However, AARC challenges the validity of that assertion. Based upon its review of SoundScan Data and music marketing information, AARC contends that Borset is not the featured recording artist on any of the six recordings and, thus, has no basis for asserting the claim. Instead, AARC identifies the featured recording artists for the six sound recordings, respectively, as The Grateful Dead; The Grateful Dead; The Rolling Stones, London Bach Choir, and Doris Troy; The Beatles/John Lennon; The Beatles; and The Band and Neil Young.

In support of its contentions, AARC relies on the legislative history of the AHRA and asserts that Congress understood "Featured Recording Artist" to be "a term of art readily understood in the music industry." Motion at 4; see also, H.R. Rep. No. 102-873(I), at 18 (1992). It then observes that three years later, when Congress passed the Digital Performance Right in Sound Recordings Act of 1995, Congress made clear that the term "featured recording artist" refers to the "performing group or ensemble or, if not a group or ensemble, the individual performer, identified most prominently in print on, or otherwise in connection with, the phonorecord actually being performed . . . [and that] a vocalist or soloist performing along with a group or ensemble is not a 'featured recording artist' unless that person is identified in connection with the phonorecord as the primary performer." S. Rep. No. 104-128, at 36 (1995).

Borset did not respond to AARC's motion.

#### Discussion

Section 259.3 of the Copyright Office rules, title 37 of the Code of Federal Regulations, requires a claimant to provide certain information to the Copyright Office as part of its claim. In addition to the more commonplace elements, like name and address, there are two key requirements that must be supplied in order to substantiate a claim. First, the claim must state how the claimant fits the definition of an interested copyright party. 37 C.F.R. § 259.3(a)(3). Second, the claim must identify a sound recording or a musical work embodied in a musical recording which has been distributed or transmitted to the public during the preceding calendar year. In the case of the Borset claim to the Featured Recording Artists Subfund, Borset must be a featured recording artist pursuant to 17 U.S.C. § 1001(7)(C) and have identified a sound recording for which she is the featured recording artist.

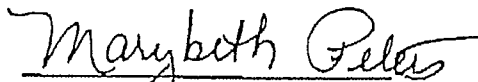
While we reserve judgment on whether facts could be developed to support Borset's assertion that she is a featured recording artist, we can clarify who, in general, fits the definition of a "featured recording artist" within the meaning of the Copyright Act. First, the statute makes it quite clear that mere performance is not the test. Otherwise, Congress would not have carved out a separate portion of the royalty fees collected under the AHRA for distribution to non-featured vocalists and musicians. See 17 U.S.C. § 1006(b). Second, although Congress failed to include a precise definition in the law, it did discuss the term on two occasions when it passed laws that specifically affected the rights of featured recording artists. As noted above, the legislative history makes clear that when Congress used the term, "featured recording artist," it was referring to the group, ensemble, or individual that is identified as the primary performer of the work.

Clearly, Borset has made the proper representations in her claim; otherwise the claim would not have been accepted in the first instance. Nevertheless, bald assertions are not enough to force the matter to a CARP hearing when another party raises a legal challenge to the sufficiency of the claim. Here, AARC contends that Borset is simply not a featured recording artist because she is not the individual most prominently associated with the sound recordings identified in her claim; therefore, she has no basis for making her claim to the Featured Recording Artists Subfund.

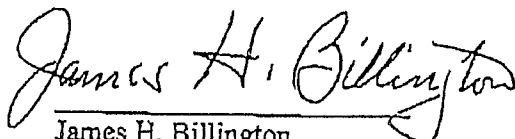
Borset, for her part, has remained silent in the face of AARC's formal assertions that she is not a featured recording artist. She did not contest the motion or defend her initial claim. In fact, Borset has made no showing to support her contention that she is a featured recording artist pursuant to section 1001(7) beyond the statements in her claim. She has never claimed to be the primary performer of any of the six works she identifies in her claims nor has she claimed that she is the person most prominently identified with the works. Moreover, she has not offered any other interpretation of the term "featured recording artist" or contested the interpretation AARC offers. Thus, Borset has failed to make a *prima facie* showing that her claim is valid. Therefore, the motion to dismiss the claim for failure to provide the required elements to establish the basis for a claim to the royalty fees in the Featured Recording Artists Subfund must be granted.

Wherefore, **IT IS ORDERED** that the Motion of the Alliance of Artists and Recording Companies to Dismiss the Borset Claim to the Featured Recording Artists Subfund **IS GRANTED**, and the Borset claim to the Featured Recording Artists Subfund **IS DISMISSED**.

SO RECOMMENDED.

  
Marybeth Peters,  
Register of Copyrights.

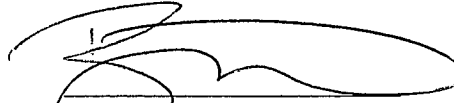
SO ORDERED.

  
James H. Billington,  
The Librarian of Congress.

DATED: August 21, 2003

**CERTIFICATE OF SERVICE**

I, Breanna Dietrich, Deputy Director of Royalties of the Alliance of Artists and Recording Companies, certify that a copy of the foregoing "Motion Of The Alliance Of Artists and Recording Companies To Dismiss The Pillai 2011 DART Sound Recordings Fund/Copyright Owners Subfund Claim" was sent, by USPS Express Mail on April 26, 2012, and by email on April 27, 2012 (date of filing with the Copyright Office), on the following party:

  
Breanna Dietrich

**BY USPS EXPRESS MAIL ON APRIL 26, 2012  
AND EMAIL ON APRIL 27, 2012:**

Pramod Kesav Narayana Pillai<sup>1</sup>  
Payikkattu House  
Kalawamkudan PO  
Cherchala  
688586 Alleppey, Kerala  
INDIA

---

<sup>1</sup> No postal carrier is able to provide overnight delivery service to India. We have therefore sent this pleading to Mr. Pillai electronically via email and by USPS Express Mail, which will arrive in an estimated 3-5 business days.